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IMPOSSIBLE FOODS INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IMPOSSIBLE FOODS INC., a Delaware
corporation,

Plaintiff/Counter-Defendant,

v.

IMPOSSIBLE LLC, a Texas limited liability
company, and JOEL RUNYON,

Defendants/Counter-Plaintiffs.

Case No. 5:21-cv-02419-BLF (SVK)

**MOTION FOR RELIEF FROM
NONDISPOSITIVE PRETRIAL ORDER
OF MAGISTRATE JUDGE;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

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Judge: Hon. Beth Labson Freeman
Date: August 28, 2025
Time: 9:00 a.m.

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NOTICE OF MOTION

TO DEFENDANTS/COUNTER-PLAINTIFFS IMPOSSIBLE LLC AND JOEL
RUNYON AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on August 28, 2025, before the Honorable Beth Labson
Freeman, Courtroom 3, 5th floor, San Jose Courthouse, 280 South 1st Street, San Jose,
California 95113, at 9:00 a.m. or as soon thereafter as the matter may be heard,
Plaintiff/Counter-Defendant Impossible Foods Inc. (“Impossible Foods”) will and hereby does
object to the Magistrate’s May 6 Order regarding the crime-fraud exception, under Federal Rule
of Civil Procedure 72(a) and Local Rule 72-2. ECF 208.

Impossible Foods’s motion is based on this Notice of Motion and accompanying
Memorandum of Points and Authorities in Support, the pleadings and papers on file in this
action, and such other written or oral argument as may be presented.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On May 6, 2025, Magistrate Judge van Keulen (the “Magistrate”) denied Impossible
Foods’s motion to compel production or *in camera* review of Impossible LLC’s purportedly
privileged documents pursuant to the crime-fraud exception. ECF 208 (the “Order”). Impossible
Foods objects because if Impossible Foods does not, it may waive its objections on appeal to the
Ninth Circuit. *See Simpson v. Lear Astronics Corp.*, 77 F.3d 1170, 1174 n.1 (9th Cir. 1996).

The Order is clearly erroneous for two primary reasons. **First**, a preponderance of the
evidence shows that Impossible LLC’s purportedly privileged communications concerning
several sworn—but false—Statements of Use (the “Communications”) were made in furtherance
of a fraud upon the United States Patent & Trademark Office (the “PTO”), meaning the crime-
fraud exception applies. **Second**, it was an abuse of discretion to deny Impossible Foods’s
request for an *in camera* review of the Communications under *United States v. Zolin*, 491 U.S.
554 (1989), because although the Magistrate cited the correct standard, that “minimal” standard

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1 was not actually applied.

2 In particular, the Magistrate construed all evidence in the light most favorable to
3 Impossible LLC and drew all inferences in Impossible LLC's favor in denying *in camera*
4 review—essentially imposing a summary judgment standard on Impossible Foods. But
5 Impossible Foods was only required to provide “a factual basis adequate to support a good faith
6 belief by a reasonable person . . . that an *in camera* review of the materials may reveal evidence
7 to establish the claim that the crime-fraud exception applies.” *Id.* at 572. To be clear, the Ninth
8 Circuit has held that this is a “minimal burden” that “is meant **only** to prevent **groundless fishing**
9 **expeditions.**” *United States v. Christensen*, 828 F.3d 763, 800 (9th Cir. 2015) (emphasis added).
10 The Magistrate clearly erred in failing to apply this “minimal” standard.

11 For these reasons and those provided below, the Court should compel Impossible LLC
12 either to produce the Communications to Impossible Foods or to submit them to the Court for *in*
13 *camera* review.

14 **II. ARGUMENT**

15 **A. A Preponderance of the Evidence Shows That the Communications Were Made** 16 **in Furtherance of a Fraud on the PTO**

17 Even without an *in camera* review, it was clear error for the Magistrate to decline to
18 compel production of the Communications under the crime-fraud exception. That exception
19 applies where a preponderance of the evidence shows that “attorney-client communications were
20 made in furtherance of a future crime or fraud.” *Zolin*, 491 U.S. at 563; *see also Anbang Grp.*
21 *Holdings Co. Ltd. v. Zhou*, No. 23-CV-00998-VC (TSH), 2024 WL 199563, at *1 (N.D. Cal. Jan.
22 18, 2024) (“In civil cases in the Ninth Circuit, the standard of proof for outright disclosure under
23 the crime-fraud exception is preponderance of the evidence.”). Here, the relevant “fraud” is fraud
24 on the PTO. *See Laser Indus., Ltd. v. Reliant Techs., Inc.*, 167 F.R.D. 417, 422 (N.D. Cal. 1996)
25 (applying crime-fraud exception in context of fraud on the PTO claim).

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1 [REDACTED]
2 [REDACTED]
3 Specifically, Runyon swore under oath that “the mark is in use in
4 commerce on or in connection with all goods/services . . . listed in the existing registration [or
5 application] for the specific class,” Flemming Decl. at ¶¶ 3–8, Exs. B, C, D, E, F, and G
6 (emphasis added). [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]

11 The materiality of the Statements of Use is undisputed. [REDACTED]
12 [REDACTED]
13 [REDACTED]

14 And it is well-settled that “[i]f the registrant
15 uses the mark, but not on the goods listed in the registration, the [entire] registration may be
16 canceled for fraud.” 4 J. Thomas McCarthy, *McCarthy on Trademarks & Unfair Comp.* § 31:73
17 (5th ed. 2025). Thus, the only disputed element of fraud is scienter—i.e., whether Impossible
18 LLC intended to deceive the PTO.
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]

25 The Magistrate credited [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

but “direct evidence of deceptive intent is rare, [so] a district court may infer intent from indirect
and circumstantial evidence.” *Int’l Test Sols., Inc. v. Mipox Int’l Corp.*, No. 16-CV-00791-RS,
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2017 WL 2118314, at *7 (N.D. Cal. May 16, 2017). The Ninth Circuit has held that the crime-fraud exception can apply “without any need to rely on statements” from the accused party. *In re Grand Jury Subpoena of Connelly*, 28 F.3d 106 (9th Cir. 1994). Here, the language of the Statements of Use is plain, Runyon’s “explanations” make little sense, and a *preponderance* of the *circumstantial* evidence thus shows that Runyon knew exactly what he was doing.

Thus, those attorney-client communications were made “in furtherance” of the alleged fraud on the PTO, and the crime-fraud exception applies.

B. The Magistrate Did Not Apply The “Minimal” *Zolin* Standard

The Magistrate clearly erred by failing to apply the *Zolin* standard; she applied one more akin to the summary judgment standard. The Magistrate relied solely upon a credibility determination—i.e., whether Runyon appeared truthful when he testified—and viewed all evidence in the light most favorable to Impossible LLC.¹

Again, the *Zolin* standard is a “minimal burden” that “is meant only to prevent groundless fishing expeditions.” *Christensen*, 828 F.3d at 800-01. For that reason, courts usually should not engage in an “assessment of credibility,” which “will typically be better left to the fact-finder” *In re Green Grand Jury Proc.*, 492 F.3d 976, 985 (8th Cir. 2007). “[C]onclusive proof is not necessary at this stage,” only a factual showing “sufficient to support a good faith belief that *in camera* review may reveal evidence to establish [the] claim that the

¹ For example, the Magistrate addressed how Impossible LLC corrected a registration and found that the timing of the correction was irrelevant. ECF 208 at 3, n.1. But the timing is critical: the fact that Impossible LLC only corrected its registration after the PTO *conducted an audit of that registration* shows that Impossible LLC was only scrambling to escape the consequences of its lies. The Magistrate clearly erred in viewing this evidence in the light most favorable to Impossible LLC.

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crime-fraud exception applies.” *Nat.-Immunogenics Corp. v. Newport Trial Grp.*, 2018 WL 6168035, at *8 (C.D. Cal. June 12, 2018) (emphasis added) (declining to address “credibility concerns”); *see also Connelly*, 28 F.3d at 106 (9th Cir. 1994) (“[T]he government’s submission and the contents of the withheld documents sufficiently establish the existence of the crime-fraud exception without any need to rely on statements by Diane Connelly or Smith.”). The Ninth Circuit has made clear that, under *Zolin*, “[s]ome speculation is required.” *Christensen*, 828 F.3d at 800.

Here, there is only one element of fraud truly in dispute (scienter), and as discussed in the previous section, ample circumstantial evidence shows that Runyon intended to deceive the PTO.

Whether the Communications confirm Runyon knew exactly what he was doing, or exonerate him, will only be revealed upon *in camera* review. Thus, it was an abuse of discretion and clear error for the Magistrate to conclude that Impossible Foods had not met its “minimal burden” under *Zolin* to provide “a factual basis adequate to support a good faith belief by a reasonable person . . . that an *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies. *Christensen*, 828 F.3d at 800; *Zolin* 491 U.S. at 572.

III. CONCLUSION

For the foregoing reasons, Impossible Foods respectfully requests that the Court compel Impossible LLC either to produce the Communications to Impossible Foods or to submit them to the Court for *in camera* review.

DATED: May 16, 2025

Respectfully submitted,

KILPATRICK TOWNSEND & STOCKTON

By: /s/ H. Forrest Flemming, III

R. Charles Henn Jr. (*pro hac vice*)

H. Forrest Flemming, III (*pro hac vice*)

Erica Chanin (*pro hac vice*)

Kollin Zimmerman (SBN 273092)

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Attorneys for Plaintiff/Counter-Defendant
IMPOSSIBLE FOODS INC

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CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2025, the foregoing document was filed electronically using the Court's CM/ECF system, which will send notification of such filing to counsel of record.

/s/ H. Forrest Flemming, III
H. Forrest Flemming, III

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